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No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

REPLY BRIEF AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT OR ALTERNATIVELY TO COMPEL COMPLIANCE WITH ADMINISTRATIVE INVESTIGATION PURSUANT TO ARTICLE VIII(H) OF THE ARKANSAS RIVER COMPACT

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INTRODUCTION

Colorado has responded to Kansas' motion for leave to file its complaint by explaining that "Kansas has not made a reasonable effort to resolve this matter [administratively]" and by arguing that "Kansas has an adequate means for vindicating its concerns through a pending investigation by the

[Arkansas River Compact] Administration." Colorado's Brief in Opposition at 1. Based on the facts as related by Colorado, Colorado's position clearly comports with the principle that the Court will not entertain an otherwise justiciable action between states when an alternative forum or administrative remedy is available to the plaintiff state. *See, e.g., Massachusetts v. Missouri,* 308 U.S. 1, 19-20 (1939). Colorado, however, has not recited the essential facts, has dissembled those it did recite, and would mislead the Court into a decision to decline jurisdiction. The object of the reply is to relate the relevant facts, to apply them to the principle of administrative exhaustion, to reveal the unctuousness of Colorado's opposition to Kansas' motion for leave to file its complaint, and to support Kansas' alternative motion to compel compliance with the Arkansas River Compact Administration's Resolution of March 28, 1985, made pursuant to Article VIII(H) of the Compact.

STATEMENT OF FACTS

Colorado divides its statement of facts into two parts, those relating to the administrative investigation which was conducted pursuant to the Resolution of March 28, 1985, and "background facts" relating to the history of Colorado's regulation of ground water. With regard to the administrative investigation, Colorado imparts the spurious view that the committee functioned harmoniously since April, 1985, "to determine if there had been any changes in the relationship between streamflows at selected locations in the Arkansas River Basin." Brief in Opposition at 4. Colorado also suggests that Kansas' amendment on July 12, 1985 of the Resolution of March 28, 1985, interrupted the investigatory process and raised new issues. Colorado then explains that "extensive reports" were submitted and that the "Administration expressly authorized the committee to 'continue with its investigation of the matters upon

which the Committee has mutually agreed that further investigation should be undertaken,'" suggesting to the Court that the resolution reaffirmed that the administrative investigation was operating smoothly and it should continue.[1] *Id.*

In contrast to this sanguine picture, Colorado juxtaposes the Kansas Attorney General's announcement that suit would be filed on December 16, 1985, suggesting that his ostensibly maverick actions differ sharply from the prudent course sought to be followed by the Arkansas River Compact Administration.

ADMINISTRATION OF COLORADO WATER LAW

With regard to the "background facts," Colorado explains that the Colorado State Engineer was justified in believing that he had no authority prior to 1965 to regulate ground water diversions and that in 1965 the Colorado legislature acted expeditiously to provide the State Engineer with "clear" authority. Armed with this newfound authority, according to Colorado, the State Engineer promptly set out to curtail the use of alluvial wells along the Arkansas River. Despite the good intentions of the State Engineer, however, the Colorado Supreme Court found his regulatory effort unconstitutional, which motivated immediate action by the legislature to investigate the need for legislation which would accommodate

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[1] Contrary to Colorado's assertion, the United States' Representative to the Compact Administration did not conclude that Kansas has not followed administrative procedures. Indeed, Colorado takes the language it quotes out of the context of arbitration, not administrative investigation. As to the latter, the United States' Representative stated that "[i]f one state refuses to permit fact finding on a practice deemed by the other state to be the cause of great injury, then the process breaks down at that point. This may be the case here." *See,* Minutes of Annual Meeting of the Arkansas River Compact Administration, December 10, 1985 at 69.

the integrated administration of surface and ground water. This investigation, according to Colorado, resulted in the enactment of the Water Rights Determination and Administration Act of 1969, which in turn led to the promulgation in 1972 of rules and regulations to curtail ground water uses in the Arkansas River Valley. Additionally, according to Colorado, the State Engineer proposed an amendment in 1974 to further curtail ground water uses, which was rejected by the Colorado Supreme Court. According to Colorado, its Supreme Court determined that there was no substance to the contention that ground water diversions had depleted the flows of the Arkansas River.

There is a grain of truth in everything Colorado has said, almost. The actual history of Colorado's regulation of ground water diversions explains its refusal to consider the adverse effects of postcompact well development on stateline flows.

For decades Colorado allowed the proliferation of unregulated wells in the Arkansas Valley, ignoring the inevitable effect on surface water users. *See, Survey of Colorado Water Law*, 47 Denver L.J. 226, 322-24 (1970); Hillhouse, *Ground and Surface Water In An Appropriation State*, 20 Rocky Mtn. Min.L.Inst. 691, 696-97 (1975). Colorado refused to address the problem, fearing that agricultural interests would be hurt by any curtailment or regulation of wells. *See, Survey of Colorado Water Law*, 47 Denver L.J. at 323; Hillhouse, 20 Rocky Mtn.Min.L.Inst. at 697. The Colorado Legislative Council was outspoken about the fact that political pressure was the true reason that nothing was done to curtail the well development. *See, Implementation of 1965 Water Legislation XXV*, Research Pub. No. 114 (1966).

Despite the fact that the State Engineer had unequivocal authority to regulate wells, he used the alleged lack of authority as an excuse to avoid a sensitive political issue and took no

action.[2] The result was a staggering increase in the number of wells, as irrigators "rush[ed] to board Colorado's underground

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[2] If no other relevant law existed in Colorado, the Arkansas River Compact, Colo. Rev. Stat. Section 149-9-1 (1963), provided all the authority the State Engineer needed to prevent the depletion of surface flows by ground water diversions. *See*, Report of the Special Master, *Texas v. New Mexico*, 446 U.S. 540 (1979); *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

There were other existing laws, however. In *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968), the first well curtailment case on the Arkansas River, the Colorado Attorney General and the intervening Arkansas surface water users took the position that the State Engineer had had the authority to regulate wells long before the 1965 act which ostensibly provided the necessary authority for the first time. Strongly hinting its agreement with this view, the Colorado Supreme Court quoted Benjamin F. Stapleton, Jr., the chairman of the Colorado Water Conservation Board:

> * * * House Bill 1066 [the 1965 act], merely gave the State Engineer the right to shut down wells. House Bill 1066 was, in my opinion, superfluous since the State Engineer had not only the right but the responsibility under then-existing laws to shut down wells which were interfering with the prior rights of other water users. The State Engineer insisted that he had no authority and to force the State Engineer to take action on these matters existing laws were amended to make what was already crystal clear even more self-evident by specific command to the State Engineer to take action against well owners in the operation and management of the total water resources of the state.
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> * * * * * * *
>
> I have always believed that the State Engineer had the authority to shut down wells if they were interfering with the rights of senior appropriators and yet, because shutting down a well is always controversial, no action was taken by the State Engineer, acting on the excuse that he had no authority under state laws.

Id. at 990.

Cont. p. 6

waterwagon." Comment, *Appropriation and Colorado's Ground Water: A Continuing Dilemma?*, 40 U.Colo.L.Rev. 133, 134-36 (1967).

In 1965, after nearly twenty years of well development which had been ignored by the State of Colorado, numerous Arkansas River Ditch Associations petitioned the State Engineer, demanding well diversions be curtailed in order to stop

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Footnote 2, Cont.

The existing law Chairman Stapleton was referring to was Article XVI, Section 5 of the Colorado Constitution, which provides that all ground water is presumed tributary to surface flow, and a conspicuous body of case law standing for the proposition that the doctrine of prior appropriation applies to tributary groundwater. *See, e.g., Colorado Springs v. Bender,* 148 Colo. 458, 461-62, 366 P.2d 552, 555 (1961); *Black v. Taylor,* 128 Colo. 449, 459, 264 P.2d 502, 507 (1953); *Safranek v. Town of Limon,* 123 Colo. 334, 228 P.2d 975, 977 (1951); *De Haas v. Benesch,* 116 Colo. 344, 350-51, 181 P.2d 453, 456 (1947); *Lomas v. Webster,* 109 Colo. 107, 110, 122 P.2d 248, 250 (1942); *Dalpez v. Nix,* 96 Colo. 540, 549, 45 P.2d 176, 180 (1935); *Faden v. Hubbell,* 93 Colo. 358, 369, 28 P.2d 247, 251 (1933); *Nevius v. Smith,* 86 Colo. 178, 182, 279 P. 44, 45 (1929); *Comrie v. Sweet,* 75 Colo. 199, 201, 225 P. 214, 215 (1924); *Ft. Morgan Reservoir & Irr. Co. v. McCune,* 71 Colo. 256, 206 P. 393, 394 (1922); *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co.,* 68 Colo. 437, 444, 191 P. 129, 131 (1920); *Trowel Land & Irr. Co. v. Bijou Irr. Dist.,* 65 Colo. 202, 216, 176 P. 292, 296 (1918); *Durkee Ditch Co. v. Means,* 63 Colo. 6, 8, 164 P. 503, 504 (1917); *Comstock v. Ramsay,* 55 Colo. 244, 255-56, 133 P. 1107, 1110 (1913); *La Jara Creamery & Live Stock Ass'n. v. Hansen,* 35 Colo. 105, 109, 83 P. 644, 645 (1905); *Ogilvy Irrigating & Land Co. v. Insinger,* 19 Colo. App. 380, 386-87, 75 P. 598, 599 (1904); *Buckers Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co.,* 31 Colo. 62, 71, 72 P. 49, 52 (1902); *Platte Valley Irr. Co. v. Buckers Irr., Mill. & Imp. Co.,* 25 Colo. 77, 82, 53 P. 334, 336 (1898); *Bruening v. Dorr,* 23 Colo. 195, 197-98, 47 P. 290, 292 (1896); *McClellan v. Hurdle,* 3 Colo. App. 430, 33 P. 280 (1893).

depletions of surface flows. Following the State Engineer's refusal to act, H. B. 1066 was enacted in 1965 to force the State Engineer to "execute and administer the laws of the state relative to the distribution of the surface waters of the state including the underground waters tributary thereto in accordance with the right of priority of appropriation." Colo. Rev. Stat. Section 148-11-22(1) (Supp. 1965); *see also, Proceedings of the Joint Session* 1-8, Mineral Law & Water Law Sections, Colorado Bar Assoc. (October 15, 1966).

The long overdue legislation was not popular with farmers:

> [I]n the absence of any other specific statutory language prior to 1965, individual farmers in Colorado invested thousands of dollars in developing underground water as a source of supply for their crops. It is no wonder, then, that . . . House Bill No. 1066 . . . was considered as a threat to their personal livelihood and a taking of their property without due process of law . . .. [I]t is not surprising that many persons view the . . . action in 1965 with deep-felt bitterness and resentment, when the main thing wrong with this legislation is that it was enacted some 20 or 30 years later than it should have been.

47 Denver L.J. at 323.

As of 1967 the State Engineer still had not promulgated any rules and regulations. In a forthright decision in 1967, the district court enjoined one farmer, Roger Fellhauer, from pumping his alluvial wells because there was no unappropriated water in the Arkansas system. Concerned with the district court's decision and fearing that it may have gone dangerously far toward actual priority administration in H. B. 1066, the legislature passed S. 407 in 1967, while *Fellhauer* was pending appeal. The new legislation called for an investigation of well

depletion and an evaluation of additional legislation.[3] *See*, 47 Colo. L. Rev. at 327-28. Shortly thereafter, Roger Fellhauer persuaded the Colorado Supreme Court that H. B. 1066 was unconstitutional. *See, Fellhauer v. People*, 447 P.2d 986 (Colo. 1968).

Based on this spotted history "[t]he National Water Commission found Colorado's experience in dealing with physically integrated ground and surface waters a persuasive argument why other states should develop legal systems providing for their coordinated administration as soon as possible." Hillhouse, 20 Rocky Mtn.Min.L.Inst. at 691, *quoting* National Water Commission, *Water Policies for the Future* 233, Final Report to the President and to the Congress of the United States (1973).

Against this background, Colorado's refusal to even consider Kansas' claim that the wells in the Arkansas Valley are depleting stateline surface flows demonstrates Colorado's attempt to bury a problem that has plagued the state for decades. While Colorado would have the Court believe that well depletion is imaginary, it is in fact very real, and Colorado's refusal to

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[3] In its Brief in Opposition , Colorado cites one of the studies done pursuant to S. 407, *i.e.*, W. W. Wheeler and Associates and Woodward – Clyde & Associates, *Water Legislation Investigations for the Arkansas River Basin in Colorado* (1968). Brief in Opposition at 5. There was no apparent reason for Colorado's reference to the study, especially in light of its principal conclusion that "[t]he use of wells in recent years has materially decreased the surface flow available to direct flow and storage rights." *See*, Vol. I, Summary Report at 3.

consider it exemplifies its desire to confound any meaningful investigation by the Arkansas River Administration.[4]

ADMINISTRATIVE INVESTIGATION OF DEPLETIONS OF SURFACE FLOWS BY WELLS

Colorado's explanation of the history and the efficacy of the Compact Administration's investigation pursuant to Article VIII(H) and the Resolution of March 28, 1985, is equally disingenuous.

First, Colorado states that:

> Kansas admits, however, that the well development of which it complains occurred almost exclusively *prior to 1965*. Nevertheless, and despite its allegation that since 1974 there has been a substantial decrease in usable stateline flows, it was not until March 28, 1985, that Kansas *for the first time*, requested the Administration to investigate whether well development in Colorado had caused material depletion to the waters of the Arkansas River. The Kansas brief implies that well development in Colorado had been the subject of discussion by the Administration for several years . . ..

Brief in Opposition at 9-10 (citations omitted) (emphasis in original).

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[4] In 1966 there was insufficient Arkansas River water to satisfy 1887 priorities. In the Colorado State Engineer's valiant effort to remedy the problem, he sought to enjoin 39 out of some 2,000 wells in only two of Colorado's 13 water districts. The Division Engineer on the Arkansas River didn't mince words when he described the lack of enthusiasm; all of the valley wells were not shut down "because you are going to affect the economy of the valley." *Fellhauer*, 447 P.2d at 992.

The implication Colorado offers the Court is that Kansas has sat on its hands, idly watching the stateline flows decline over the years.[5]

The actual history is quite the contrary. As early as its meeting on December 11, 1956, "[t]he Administration held considerable discussion concerning the activity of well drilling and its effect on conditions." *Minutes of Annual Meeting*, December 11, 1956 at 15. Since then, well depletion has been discussed, both formally and informally, at numerous meetings of the Compact Administration. On April 23, 1977, Mr. Harry Bates, a member of the Buffalo Mutual Irrigation Co. and Colorado's Compact Administration representative from District 67, submitted a memorandum to the Arkansas River Compact Administration regarding "problems concerning storage in John Martin Reservoir."[6] After noting that "the most recent 10 year average shows a decline of over 54,000 a.ft. [in storage] from that of the first 10 years of Compact operation, Mr. Bates reported "that the most probable causes are as follows:

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[5] Even Colorado agrees that the stateline flows "declined substantially" beginning in 1974. *See,* J. W. McDonald, *Report to Investigation Committee of the Arkansas River Compact Administration* (September 6, 1985). The most recent study of depletions in Colorado of stateline flows concludes that "[s]treamflow at the Kansas stateline has been reduced significantly since 1949 due to increased consumption of water in Colorado" and "[a]ctual and usable streamflows at the stateline during the period 1974 to 1983 are significantly less than those that occurred during the pre-compact period and during the post-compact period up to 1974." S. S. Papadopulos & Associates, Inc., *Status Report on Evaluations of Streamflow Depletions Along the Arkansas River* (February 17, 1986).

[6] District 67 is the area below John Martin Reservoir, encompassing the water uses in the 60 miles stretch to the stateline. Because of the location of the District, its interests are often the same as those of Kansas.

1. Heavy increase in winter irrigation during the months of November thru March by water users in Colorado Water Districts 14 and 17 upstream from John Martin Dam.

2. A proliferation of wells pumping from the aquifer hydraulically connected to the live river stream above John Martin.

3. Transfer of some water rights from agricultural use to municipal and industrial use.

4. Recently, a re-regulation of river flow by Pueblo Reservoir. This re-regulation will be amplified by operation of the Trinidad Dam.

5. Increase in phreatophyrtic growth along the river.

6. Less run-off because of increase in contour terracing, stock water ponds, range land pitting, and other conservation practices."

Id. at 1-2.

Quantitatively, the most significant depletion resulted from ground water diversions. *Minutes of Annual Meeting*, December 12, 1978, at 11-12.[7]

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[7] In his memorandum, Mr. Bates recognized that he was confronting upstream Colorado users, but nevertheless recommended that the Administration investigate the problem. He was replaced on August 16, 1977.

While Mr. Bates was outspoken, he was not alone. In the 1960's, Colorado farmers like Frank Milenski, one of the valley's pre-eminent experts on the history of water use, lobbied state politicians to curb the drilling of wells, which in effect gave relative newcomers along the river access to his 19th century water right. Kansas City Star, February 23, 1986, at 14A.

While the issue of well depletions was discussed with growing frequency in the 1970s, this issue and others were the subject of many meetings and exchanges of correspondence between engineers and the Attorneys General of the respective states. These discussions were cited in Attorney General Stephans' letter of February 26, 1985 to Colorado Attorney General Duane Woodard:

> You will recall that in the late 1970s certain administrative practices above John Martin Reservoir in Colorado generated considerable concern on the part of the Kansas delegation to the Arkansas River Compact Administration. Numerous special and regular meetings of the Administration were devoted to discussion of the problems, but essentially no progress was made toward their resolution. On August 31, 1982, your predecessor and I met with the agency and compact officials to further clarify the issues that had stalemated the Administration. Our participation, however, was not particularly fruitful. While the Administration meetings continued to conclude with an exchange of negative votes on the respective delegations' attempts to resolve the issues, we recited the states' positions in a protracted exchange of correspondence. The discussions ended with an unsuccessful attempt by Kansas to initiate arbitration pursuant to Article VIII(D) of the Compact.

Having been repeatedly discouraged over the years by the State of Colorado's proven disinclination either to acknowledge or to do anything about the continuing depletions of surface flows by wells, the State of Kansas contracted with Simons, Li & Associates, Inc. on September 26, 1983 to study the depletions in relation to Colorado's obligations under the

Arkansas River Compact. Noting that "[w]ell depletions in Colorado have been estimated to be from 150,000 to 200,000 acre-feet per year, according to the Colorado State Engineer and others," Simons, Li & Associates concluded that "[s]ince 1974 . . . usable flows have declined to about 45 percent of pre-compact values . . . [and] well development in Colorado has caused approximately 150,000 acre-feet per year of depletions to the Arkansas River." *Preliminary Assessment – Development and Administration of Water Resources of the Arkansas River* at iv.

While Colorado's suggestion to the Court "that well development in Colorado had [not] been the subject of discussion by the Administration [in previous] years" is belied by the history, its factual assertion that "[t]he Colorado representatives did not refuse to investigate the substance of the Kansas allegation concerning well development in Colorado" is flatly wrong. Brief in Opposition at 10-11.

To support its statement, Colorado claims the issue is "what to investigate first," and blithely concludes that only changes in plains precipitation need be investigated. Its "conclusion" that declines in eastern plains precipitation are the cause of the declines in usable stateline flows derives from the Investigation Committee's use of a technique called "mass diagram analysis." Mass analysis is useful in determining trends over long periods of time, but "it should be emphasized," in Colorado's words, that:

> . . . they do not explain the reasons for trends or changes in the relationship between two sets of streamflow data. Such changes may be due to inherent variability of hydrologic data, changes in record-keeping methods, or many other factors. Likewise, the mere fact that there is no change in the relationship between two sets of streamflow data does not necessarily mean that

> no real change in the relationship has occurred or that there is a causal connection between the two sets of data.

J. W. McDonald, [Colorado's] *Report to Investigation Committee of the Arkansas River Compact Administration* 1 (September 6, 1985).

Despite the agreement of Kansas and Colorado that causes of declines in flows cannot be identified or isolated by the technique, Colorado concluded that the decline in flows shown by the Investigation Committee's mass analysis "was directly related to a decline in tributary inflow from plains drainage areas . . .." J. W. McDonald, *Memorandum to Arkansas River Compact Administration* (October 4, 1985) at 19.

It is clear that Colorado's attempt to isolate the causes of depletions in stateline flows and to restrict the administrative investigation to those causes cannot be justified. When this precise issue was addressed by recognized experts, it was concluded that postcompact well development in Colorado has unquestionably materially depleted the Arkansas River and that Colorado's purposeful attempt to avoid study of well depletions is not remotely justifiable on the basis of any hydrologic or engineering reason. *See*, S. S. Papadopulos & Associates, Inc., *Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact* (December 6, 1985). If the Administration's investigation is to be meaningful, all possible causes of depletion to stateline flows must be investigated.

Aside from sound engineering practice, the language of the Compact in regard to administrative investigations is unambiguous and mandatory: "Violation of any of the provisions of this Compact . . . which come to the attention of the Administration shall be promptly investigated by it." Article VIII(H).

Notwithstanding the mandate of the Compact, Colorado refused to proceed to investigate depletions by wells and five other areas in the Resolution of October 8, 1985.[8] That resolution was *not* a bilateral affirmation that the investigation should proceed, but rather a unilateral rejection of the investigation in essentially all of the areas deemed crucial by the State of Kansas.

KANSAS' OTHER ALLEGATIONS OF MATERIAL DEPLETION

Colorado has also maintained that "[o]ther matters raised by Kansas do not justify an original forum in this Court." Brief in Opposition at 17. The other matters are: 1) the operation of Trinidad Reservoir; 2) Colorado's refusal to quantify transmountain return flows, and 3) Colorado's refusal to abide by the Resolution of July 24, 1951. While Colorado refuses to consider these matters, Kansas has maintained that they must be investigated.

With regard to Trinidad, the matter was initially investigated in 1981, and the Administration's recommendation that the Colorado State Engineer immediately release 18,290 acre feet of water unlawfully stored was defeated by Colorado's negative vote on the Resolution of January 4, 1982. The same issue is

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8 Anomalously, while Colorado has refused to participate in a prompt, bilateral investigation of depletions caused by well development in Colorado, as required by Article VIII(H), the Colorado legislature has funded and the Colorado water agencies have undertaken a unilateral investigation of the well development, refusing to make the information compiled for its study available to the Compact Administration.

Colorado has also expressed an interest in investigating alleged depletions of surface flows by wells in Kansas. In other words, Kansas wells deplete the flow of the river but Colorado wells don't.

being addressed by the U.S. Bureau of Reclamation now, and the Bureau has agreed with Kansas that Colorado has stored large amounts of water in Trinidad in violation of the Reservoir's Operating Principles. Colorado's statement that "Kansas has adequate means to address its concerns . . . through the review process being conducted by the . . . Bureau" is incorrect. The Bureau has no power to force Colorado to vote affirmatively.

Transmountain return flows present another sensitive issue. Colorado admits that it refuses to investigate transmountain return flows, but characterizes the issue as "a hypothetical controversy which is not ripe for adjudication." Brief in Opposition at 19. Return flows need to be investigated, however, for two reasons. First, in all of the mass analyses that have been performed, the transmountain water in the Arkansas River has been arithmetically removed from the upstream gages, while the return flows, as a matter of fact, contribute to the regimen of the river and have not been quantified and arithmetically removed from the downstream gages. The result is that the actual depletion of stateline flows is greater than shown by the administrative investigation by the amount of the returns. Secondly, Colorado refuses to quantify the returns because they may be fully consumed by the importer under Colorado law. Kansas is interested in preventing any further consumption of the returns because they represent wet water that could be used to offset Colorado's failure to meet its Compact obligations.[9]

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[9] The real reason Colorado refuses to cooperate is to buy the time needed for its courts to approve programs of return flow utilization. *See, e.g.*, the Application of Colorado Springs in Water Division No. 2, No. 84-CW-179. The object is to sanction the programs with court decrees, thus adding the inertia thought sufficient to prevent this Court from awarding the water to Kansas in lieu of interfering with the economy derived from well pumping.

With regard to Colorado's refusal to abide by the Administration's Resolution of July 24, 1951, Colorado tries to explain that "the resolution expressed [only] a policy . . . that there be no reregulation of native waters of the Arkansas River . . . until a plan of operation had been submitted to and approved by the Administration." Brief in Opposition at 19. The resolution, however, was the consideration for Kansas' approval of the Gunnison-Arkansas Project, its object being to assure that any reregulation of native water in Arkansas River storage structures would not undermine the mutual rights and obligations set out in the Compact. *See, e.g.*, Senate Report No. 1742, 87th Congress, 2d Sess., July 19, 1962. The federal representative to the Compact Administration agrees with Kansas and with Congress that reregulation "require[s] consideration by the Compact Administration." F. G. Cooley, Letter to the Arkansas River Compact Administration (January 14, 1985).

ARGUMENT

In the Court's second decision in *Texas v. New Mexico*, 462 U.S. 554 (1983), it was recognized that when an interstate compact commission is not able to act, the dispute will be considered by the Court.[10] This is consistent with the rule

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[10] The doctrine of primary jurisdiction does not apply to this case. That doctrine is concerned with placement of a case in the proper initial forum. *See, United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). Here, it is undisputed that the Administration is the proper initial forum. The dispute is whether, in light of Colorado's unjustified refusal to investigate all of Kansas' allegations, the case should continue in that forum. That is an administrative exhaustion issue.

The doctrine of primary jurisdiction does not apply for another reason. As *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) demonstrates, an underlying assumption of the doctrine is that the administrative agency is able to act, render a decision, and award

Cont. p. 18

that a litigant need not resort to administrative remedies when they would be futile. *See, Moore v. East Cleveland*, 431 U.S. 526 (1977) (dissenting opinion); *see also, Aleknagik Natives v. Andrus*, 648 F.2d 496 (9th Cir. 1980). Nor has the Court required administrative exhaustion if administrative relief is inadequate. *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752 (1947). Administrative relief may be inadequate if, although it is adequate in theory, it is not available in practice. *See, McNeese v. Board of Education*, 373 U.S. 668 (1963). If the Court finds that awaiting the agency decision would "put aside substance for needless ceremony," administrative exhaustion will not be required. *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587 (1926).

As the actual history of Compact administration and investigation demonstrates, Kansas has attempted to invoke and exhaust all potential administrative remedies. The problem has been Colorado's refusal to heed the mandate of Article VIII(H) and to cooperate in a meaningful way. In this regard, the State of Kansas is still willing to participate in a continued administrative investigation, but only if Colorado is compelled "to promptly investigate" all of Kansas' allegations of compact violation.

In 1980, the Court amended Rule 9 to expressly provide that it is free with respect to a motion for leave to file to "grant or deny the motion, set it down for argument, *or take other appropriate action.*" Moore, *Federal Practice*, Paragraph 809.05 (emphasis added). Kansas suggests that appropriate action would be an order compelling Colorado to promptly

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Footnote 10, Cont.

the relief sought. In *Texas & Pacific*, the Interstate Commerce Commission was able to impartially consider all evidence and bring the case to a final conclusion. In this case the Administration has not been able to do so.

investigate all of Kansas' allegations. Without the help of the Court, a continued administrative investigation would be futile.

CONCLUSION

Colorado has not only refused to investigate Kansas' allegations of Compact violation pursuant to Article VIII(H) and the Resolution of March 28, 1986, but has also argued that "there is little likelihood of injury to Kansas" by further delay because John Martin Reservoir is full. Colorado, however, has gotten away with the explanation that less is more for many years. John Martin Reservoir has spilled only twice in thirty years. The result of Colorado's postcompact depletions has been to deprive Kansas of the renewable surface resource and force it to tap the nonrenewable ground water resources of the Ogallala aquifer. *Cf., Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982). The injury is both ongoing and obvious.

Colorado has also tried to leave the Court with the impression that it would continue the administrative investigation in good faith. Experience has shown the contrary. When Kansas sought to submit matters relating to the operation of Trinidad Reservoir to arbitration, Colorado refused, stating that it "would prefer that Kansas sue" and that "Colorado was set up to sue and be sued, not arbitrate." *See*, attached Affidavit of Carl Bentrup, Commissioner on the Arkansas River Compact Administration.

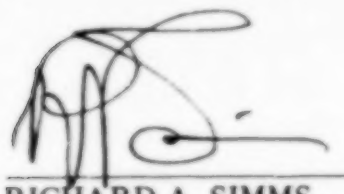
Kansas respectfully requests that Colorado be compelled to comply with the Resolution of March 28, 1985, or that the

Court grant the motion for leave to file so that Kansas might pursue its only effective remedy.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Assistant Attorney General



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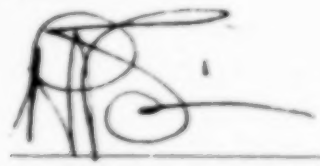
CERTIFICATE OF SERVICE

Pursuant to Rules 28(5) of the Supreme Court Rules, I certify that three copies of the foregoing Reply Brief and Brief in Support of Motion for Leave to File Complaint or Alternatively to Compel Compliance with Administrative Investigation Pursuant to Article VIII(H) of the Arkansas River Compact were served on March 4th, 1986 on:

David W. Robbins
Hill & Robbins
1441 Eighteenth Street, Suite 100
Denver, Colorado 80202



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

AFFIDAVIT

State of Texas)
) ss
County of Taylor)

I, Carl Bentrup, being first duly sworn, upon oath state:

1. That I have been a commissioner on the Arkansas River Compact Administration since June 7, 1957.
2. That on March 25, 1983, I attended a meeting of the Legal and Administration committee of the Arkansas River Compact Administration in Garden City, Kansas. At the December 14, 1982, annual meeting of the Arkansas River Compact Administration, both states had agreed to prepare procedures for arbitration.
3. At the direction of the Kansas Delegation, Mr. John Campbell, Assistant Attorney General for the State of Kansas, had prepared proposed rules of arbitration which he had submitted to the committee for discussion purposes. The State of Colorado had not developed any proposed rules for arbitration for discussion purposes. Mr. McDonald, a Colorado commissioner of the Arkansas River Compact administration, criticized a number of the proposals prepared by Mr. Campbell. Finally, Mr. McDonald left, went to the phone and called the Colorado attorney general. When he returned, he said he had spoken with the attorney general and that Colorado could see no problem that Colorado would be willing to arbitrate. He said Colorado would prefer that Kansas sue them.

Mr. McDonald said that Colorado was set up to sue and be sued, not arbitrate.

Further, affiant sayeth naught.

Dated this 28th day of February, 1986.

/s/ Carl Bentrup
Carl Bentrup, Commissioner
Arkansas River Compact Commission

Subscribed and sworn to before me this 28th day of February, 1986.

/s/ Karen S. Daniels
Notary Public

My Commission Expires 11-20-88 .